

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
:
YEKUSIEL SEBROW, *an individual*; :
on behalf of himself and : 10-CV-05897-DLI-RER
all others similarly situated, :
:
Plaintiff, :
:
v. :
: 225 Cadman Plaza East
FULTON, FRIEDMAN & GULLACE, : Brooklyn, New York
LLP, *et al.*, :
: September 1, 2011
Defendants. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ROBERT L. ARLEO, ESQ.
164 Sunset Park Road
Haines Falls, New York 12436

For the Defendant: JONATHAN B. BRUNO, ESQ.
Kaufman, Borgeest & Ryan, LLP
120 Broadway
14th Floor
New York, New York 10271

JASON PETER VERHAGEN, ESQ.
Fulton, Friedman & Gullace, LLP
28 East Main Street
Suite 500
Rochester, New York 14614

Court Transcriber: RUTH ANN HAGER
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript
produced by transcription service

1 (Proceedings began at 11:44 a.m.)

2 THE CLERK: Civil cause for an oral argument in case
3 number 10-CV-5897, Sebrow v. Fulton, Friedman & Gullace, LLP,
4 et al.

5 Plaintiff, please state your name for the record.

6 MR. ARLEO: Robert Arleo, 164 Sunset Park Road,
7 Haines Falls, New York for plaintiff.

8 THE CLERK: And counsel for the defendant.

9 MR. BRUNO: Jonathan Bruno from the law firm of
10 Kaufman, Borgeest & Ryan for the defendants.

11 THE COURT: Good morning.

12 MR. ARLEO: Good morning, Your Honor.

13 THE COURT: Okay. Mr. Arleo, this is your motion.

14 MR. ARLEO: Yes, thank you, Your Honor. Would you
15 prefer in the microphone if I have the podium?

16 THE COURT: Whatever is the most comfortable for
17 you.

18 MR. ARLEO: Your Honor, this petty motion here is a
19 motion to amend the complaint filed by the plaintiff and the
20 amendment which is pretty liberally allowed by Federal Rule 15
21 and in conjunction with the circumstances that occurred in
22 this case should support the Court's finding that plaintiff
23 has satisfied its burden.

24 Now, the amendment in this complaint goes to
25 verification of information once extracted from the beginning

1 but could not be documented due to the delays in getting these
2 depositions done. After I conducted the depositions it was
3 clear in the testimony that was given that we have the basis
4 to support an amended complaint.

5 Additional allegations that have been brought in
6 this case concern activities by non-attorney debt collectors
7 employed in a call center by the defendant who as in and of
8 itself engaged in a massive filing of numerous thousands of
9 lawsuits and a very few number of attorneys. And it's clear
10 from the evidence that we've obtained that they're attempting
11 to use the power of the law firm to frighten consumers into
12 paying debts. And, in fact, at one point in the deposition of
13 Mr. McCarthy stated that they're all sophisticated, they're on
14 the internet now, they know their rights, which they should
15 anyway, and it's his belief that they should be intimidated
16 into paying.

17 So the amendment concerns two additional claims.
18 The first one is the referencing post-judgment remedies to
19 consumers by non-attorneys. What happens here, Your Honor, is
20 that if the consumer is not willing to work with them, and
21 "work with them" only means paying more into a payment
22 schedule, then their non-attorney debt collectors recite the
23 process of the filing of the lawsuit, your Constitutional
24 right, I believe Mr. McCarthy said, to defend or file an
25 answer, the fact that he would obtain a judgment against you

1 and the judgment would be forced by taking your property and
2 wages. It was a calculated effort.

3 And, in fact, in their offices they have a draft of
4 each state's limitations or each state's post-judgment
5 remedies. And these non-attorney debt collectors who very
6 importantly do not tell these consumers that they're not
7 lawyers, okay, and the FDCPA being a strict liability least
8 sophisticated consumer statute here supports the amended
9 complaint.

10 Very importantly, Judge, what goes on here is the
11 least sophisticated consumer. When I used to teach FDCPA my
12 students would say, well, what's the least sophisticated
13 consumer, and I always would tell them if you remember the
14 Beverly Hillbillies, if you remember Jethro, just think of
15 Jethro sitting there with that checked shirt on, that big
16 giant yellow bowl of corn flakes, and all of his lack of
17 sophistication. So it's that standard. I'll call it the
18 Jethro standard. Okay. That's what controls here.

19 It doesn't matter whether or not they told them that
20 they didn't say they were lawyers. From the perspective of
21 the least sophisticated consumer, they could believe that
22 they're talking to lawyers because who knows the process of
23 the filing of the lawsuit and the entry of the post-judgment
24 remedies. Now, there's case law, Judge, that says
25 "Referencing the post-judgment remedies before those remedies

1 are obtained are done for no other purpose than to bully the
2 consumer." They know why they're doing it. So that's one of
3 the claims.

4 Now, the other claim is concerning the summons and
5 complaint that has been mass produced and served upon these
6 consumers. It looks like from the signing of the complaint,
7 and we referenced the Miller case in Judge [unintelligible]
8 holding and ruling that the attorney's signature implies that
9 there is some type of knowledge on behalf of this lawyer.
10 He's reviewed the files. He's made professional
11 determination. He understands that there's a case. We've
12 obtained evidence to show that these lawyers aren't really
13 involved in this, that it's all done in Maryland.

14 THE COURT: Let me ask you a question.

15 MR. ARLEO: Sure. In New York there are four
16 attorneys working for the defendant, correct?

17 MR. ARLEO: I believe so in the Rochester office.

18 THE COURT: In the Rochester office.

19 THE COURT: How many lawsuits per year are filed in
20 New York from -- by this firm concerning debt collection?

21 MR. ARLEO: Sure. We've got I believe testimony
22 from Mr. Friedman states he files 7500 per month.

23 THE COURT: Seventy-five hundred per month.

24 MR. ARLEO: Right. So per year you --

25 THE COURT: Out of that office?

1 MR. ARLEO: Right. Well, that's the only office
2 that does the filing.

3 THE COURT: Okay.

4 MR. ARLEO: All right. And that's the Rochester
5 office. So you've got 82,000 lawsuits and very importantly,
6 Your Honor, as Mr. Friedman testified, it's the hope of
7 getting the default judgment. It's the hope of mass producing
8 these summonses and complaints, get the default judgment to
9 which then they could wreck havoc. Okay. And the --

10 THE COURT: So that's 18 -- 1875 lawsuits per month
11 per lawyer?

12 MR. ARLEO: Right. I couldn't handle that. I don't
13 know any lawyer who could do that. And I don't know any
14 lawyer who could review the file.

15 THE COURT: The defendants cite a case. I forget --

16 MR. ARLEO: The Eastern District. What was it, 450
17 a month or something?

18 THE COURT: Who -- I forget which judge it was,
19 maybe Judge Korman. I'm not sure.

20 MR. ARLEO: Well, he probably worked at Skadden Arps
21 or one of those other firms.

22 THE COURT: But there were -- I'm sure the lawyers
23 are Skadden Arps aren't filing each 1875 lawsuits --

24 MR. ARLEO: No. I only say that, Your Honor,
25 because I --

1 THE COURT: -- a day -- a month.

2 MR. ARLEO: -- worked there and they are expected to
3 work a lot of cases and they usually do but, you know, it's
4 patently unreasonable to think that they could have any type
5 of meaningful attorney review.

6 THE COURT: And that case was dealing with -- that
7 case was dealing with debt collection letters. That wasn't
8 lawsuits, right?

9 MR. ARLEO: Very good point, Your Honor. Exactly.

10 THE COURT: So it's a lot easier to review a debt
11 collection letter --

12 MR. ARLEO: That's right.

13 THE COURT: -- some lawyer could do 80 of them a
14 day.

15 MR. ARLEO: That's right.

16 THE COURT: And the file. But the lawsuit has a
17 summons and complaint --

18 MR. ARLEO: Right.

19 THE COURT: -- underlying documents.

20 MR. ARLEO: Right.

21 THE COURT: Perhaps an underlying debt collection
22 letter.

23 MR. ARLEO: Correct.

24 THE COURT: So to do 1875 a month would be --

25 MR. ARLEO: Unbelievable.

1 THE COURT: Right. Okay.

2 MR. ARLEO: Okay. So -- and again, Mr. Friedman
3 testified that they get default judgments of up to 80 percent
4 here so that's the goal. That's what they want to do. They
5 want to get the default. So the way the process goes is they
6 have this giant -- well, this call center in Maryland that
7 when you dial the 800 number you get connected to that call
8 center. You don't get the actual lawyers.

9 THE COURT: Jump back to the lawsuits.

10 MR. ARLEO: Sure, sure.

11 THE COURT: The 7500 lawsuits per month is that just
12 in New York or is that --

13 MR. ARLEO: I believe that's the entire aggregate
14 because --

15 THE COURT: All over the country.

16 MR. ARLEO: Right. Because they say they're -- you
17 know what, Your Honor, I don't want to say anything that I'm
18 factually incorrect on. I know they have minor offices in
19 each state that may have a lawyer and a paralegal, but I
20 believe the evidence was that 7500 come from Rochester and
21 maybe New York. Claim files in excess of 75 -- oh, that's
22 only New York. In civil courts located throughout the state
23 of New York. So that's only New York.

24 THE COURT: So that's truly coming from the four
25 lawyers.

1 MR. ARLEO: Well, that's coming from --

2 THE COURT: In New --

3 MR. ARLEO: -- that office.

4 THE COURT: Well, lawyers do sign the complaints.

5 MR. ARLEO: That was the testimony that we've got
6 but, again, is that believable? I don't know. And I'm not
7 accusing any attorney of forging documents in a court, so
8 that -- I'd just, you know, clarify that.

9 THE COURT: Okay.

10 MR. ARLEO: I'm just looking at numbers --

11 THE COURT: Um-hum.

12 MR. ARLEO: -- and amounts and the testimony. The
13 testimony was that any lawyers on that has signed that but
14 watch what happens, Judge, and you can visualize. He's just
15 sitting there, next, next, next, next, next, next, sign, sign,
16 sign, sign, file. So especially in cases like this we have
17 credit card debt. In this case law in New York it says you
18 need a contract, you need purchase invoices, you need billing
19 statements. You don't have any of that. Again, it's just the
20 attempt to get that default judgment which makes them very
21 powerful a havoc they can wreck.

22 THE COURT: They did file a lawsuit against your
23 client.

24 MR. ARLEO: Yes.

25 THE COURT: And what's the status of that?

1 MR. ARLEO: That has been withdrawn pending --

2 THE COURT: This --

3 MR. ARLEO: -- resolution of this lawsuit.

4 THE COURT: Okay. All right.

5 MR. ARLEO: Now, the -- that is the summons and
6 complaint.

7 THE COURT: That's --

8 MR. ARLEO: That is the post-judgment remedies and
9 the original one was the --

10 THE COURT: The letter that Mr. Sebrow received, the
11 contention is that by listing Mr. McCarthy at the top by the
12 firm's name, the implication to the least sophisticated
13 consumer is that Mr. McCarthy is an attorney.

14 MR. ARLEO: Correct.

15 THE COURT: When he, in fact, is not.

16 MR. ARLEO: Correct. And here's where defendant has
17 a problem. Under Klomen v. Jackson [Ph.], all we need to
18 establish is the least sophisticated consumer sitting there
19 and going, well, it could be a lawyer -- could not be a lawyer
20 because he doesn't say he's a lawyer but then again he could
21 be a lawyer because it's under the letterhead and it's
22 likely -- maybe this is the lawyer doing the file, so from a
23 strict liability aspect as Klomen said the letter can go two
24 ways and one of them violates, the defendant loses.

25 THE COURT: But on what basis -- and that was the

1 claim as originally pled. It's the same basic claim now but
2 now you want to extend it to everyone -- all of the partners.

3 MR. ARLEO: Yeah. Here's how that happened, Your
4 Honor. There's a lot of case law and a lot of cases that I've
5 done that said anyone controls policies and practices of a
6 debt collector which are deemed violative of the FDCPA may be
7 held personally liable. You don't even have to get through a
8 piercing the veil standard, so we've got enough documented
9 evidence to show that they know what they're doing, they know
10 what's going on. There's no one down in Maryland. Mr.
11 Friedman testified he was there maybe once. They're allowing
12 a bunch of nonlawyers to do all the legwork and then generate
13 summonses and complaints which we believe they amass some
14 [ph.]. So from that perspective those people are personally
15 liable for that.

16 It's important that we got that deposition testimony
17 because if you name them up front, Judge, I mean, there's a
18 real danger that it looks like you're just doing that to
19 bludgeon. Okay. But the testimony we got from those
20 depositions clearly show that those people are personally
21 controlling policy and practices. And as I said to --

22 THE COURT: So let me ask you this. The complaint
23 has -- the amended complaint has not yet been served obviously
24 on the defendants.

25 MR. ARLEO: Only in the process of this motion.

1 THE COURT: All right.

2 MR. ARLEO: So we can't serve it until Your Honor --

3 THE COURT: And the statute of limitations on the
4 letter that Mr. Sebrow received is -- is it Mr. Sebrow or is
5 it --

6 MR. ARLEO: Yeah.

7 THE COURT: Mr. Sebrow. Statute of limitations one
8 year under the FDCPA has run on the defendants to be added.

9 MR. ARLEO: No, it hasn't.

10 THE COURT: It's a one-year statute of limitations.

11 MR. ARLEO: Right.

12 THE COURT: Got the letter --

13 MR. ARLEO: Right.

14 THE COURT: -- June of 2010, I believe.

15 MR. ARLEO: Right. And he filed it in August of
16 2010 so it was in the statutory period, but all these events
17 go to relation back.

18 THE COURT: Well, that was -- that's where I'm
19 getting at.

20 MR. ARLEO: Yeah.

21 THE COURT: How do you relate the complaint back?

22 MR. ARLEO: Well, because this is -- we've found
23 through the evidence that this is an entire policy and
24 practice of doing it. It's not the letter itself.

25 THE COURT: And, of course, the firm itself, the

1 defendant, Fulton, Friedman & Gullace was defending itself
2 from the out -- well, they had another -- didn't they have
3 another attorney for a very brief period, like the initial
4 conference someone else -- who was it then?

5 MR. BRUNO: I wasn't --

6 THE COURT: You weren't part of the case. But the
7 argument would be that, look, this amended complaint relates
8 back to the original complaint. The defendants, the
9 individually named defendants have known from the get-go
10 that -- because we made it very clear that we were going to
11 get evidence. We're trying to get evidence and go after them
12 because they'll think they're robo signers -- using that term.

13 MR. ARLEO: Correct.

14 THE COURT: So they were on notice that but for --
15 you named John and Jane Doe's numbers 1 through 25.

16 MR. ARLEO: Yeah, we do that because we don't know
17 who they are.

18 THE COURT: But for the --

19 MR. ARLEO: Particular identity of those named
20 defendants.

21 THE COURT: You would have named them.

22 MR. ARLEO: Correct.

23 THE COURT: So it's really no surprise to them.

24 MR. ARLEO: No.

25 THE COURT: Okay. All right. Continue.

1 MR. ARLEO: And all I'm arguing here, Judge, is a
2 motion for leave to file an amended complaint but I really
3 feel like I'm arguing a motion for summary judgment. We have
4 enough here to get clear liability.

5 THE COURT: Not futile, right? You're saying it's
6 not futile?

7 MR. ARLEO: Oh, absolutely.

8 THE COURT: There was an undue delay because you had
9 problems -- and I'm not blaming them on anyone on either side.
10 There were issues with getting the depositions done. We had
11 litigation about that. There's no bad faith here.

12 MR. ARLEO: There's no futility. There's no bad
13 faith. There's no prejudice clearly because they knew.

14 THE COURT: And there's no undue delay.

15 MR. ARLEO: And there's no undue delay based upon
16 the circumstances that happened in this case. Now, John's
17 defense is, well, you know, that first letter -- first of all,
18 that doesn't violate. Use the Greco [Ph.] case.

19 THE COURT: Let -- oh, you can answer the
20 defendant's --

21 MR. ARLEO: With --

22 THE COURT: -- arguments --

23 MR. ARLEO: -- additional --

24 THE COURT: -- after they -- after he makes them.

25 MR. ARLEO: Okay.

1 THE COURT: So --

2 MR. ARLEO: And, Your Honor, then in addition to
3 what I said here I'd refer to the moving papers and it's --
4 this one is kind of clear. Thank you very much.

5 THE COURT: Mr. Bruno.

6 MR. BRUNO: Well, Judge, you know, our opposition is
7 based on due diligence. We understand that it's pretty well
8 standard with the amendments, but in essence we are
9 [inaudible] judgment because there has been some discovery
10 and, as Mr. Arleo pointed out, he's basing his amendment on
11 what he purportedly found during the course of discovery and
12 the dispute lies on that evidence.

13 THE COURT: Okay. Let me ask you. The 7500
14 lawsuits per month in New York, is that right?

15 MR. BRUNO: That's wrong.

16 THE COURT: Okay.

17 MR. BRUNO: It's 750 per month in New York. Call
18 your attention to Mr. Friedman's deposition transcript in
19 lines 9 through 13.

20 "Q. So 750 -- 750 lawsuits per month and that's the New York
21 office?"

22 "A. Correct."

23 "Q. With four lawyers?"

24 "A. Correct."

25 Your Honor, we're not talking about 75,000 a month;

1 we're talking about 750 a month.

2 THE COURT: Okay. So 750.

3 MR. BRUNO: Comes out to 185 lawsuits --

4 THE COURT: 187-1/2.

5 MR. BRUNO: Okay. 187-1/2 lawsuits.

6 THE COURT: Per month.

7 MR. BRUNO: Per month.

8 THE COURT: All right. So that -- give you 28 days
9 in a month. That's just under seven lawsuits per day.

10 MR. BRUNO: Right, Judge. And --

11 THE COURT: Lawsuit is to review the facts and
12 circumstances and decide whether to file a lawsuit is at least
13 a bit more whether the decision -- whether to send a debt
14 collection letter, right?

15 MR. BRUNO: It is but what we have to remember,
16 Judge, is that the collection letter has already been sent.
17 Okay. The information isn't necessarily new. It's the lawyer
18 that may be new. If the collection letter is being sent from
19 Maryland then it goes to a lawyer in New York. The
20 information hasn't changed in any way and it isn't necessarily
21 being viewed any differently other than with the thought of do
22 we have sufficient basis on which to --

23 THE COURT: Well, you've got to --

24 MR. BRUNO: -- commence this action.

25 THE COURT: You've got make -- you know, maybe after

1 the debt collection letter was sent, there was a partial
2 payment, full payment.

3 MR. BRUNO: Sure.

4 THE COURT: You've got to check. You know, so it's
5 more than a debt collection.

6 MR. BRUNO: It is more. It is more, Judge, but what
7 Mr. Arleo pointed out as well is that -- you know, and this
8 might be a little bit after the fact but a lot of these
9 cases -- and I'm talking strictly on the numbers here -- it
10 may sound like a lot from what Mr. Arleo does or for what I do
11 handling 180 cases would be tremendous. I don't do this, you
12 know, collections type of work.

13 A lot of these cases go into default. Okay. A lot
14 of these cases didn't get any response from the beginning. I
15 don't think the defendant should be faulted because underlying
16 defendants default. Okay. Right now we're talking about
17 numbers, volume. And plaintiff seems to be basing their
18 entire theory that there was no meaningful review strictly on
19 statistics. Okay. What we have is Friedman, one of them, two
20 partners at the law firm, testifying and we cite his testimony
21 in our opposition papers as to what the attorneys do as part
22 of their meaningful review. That hasn't been controverted.
23 Okay.

24 So what plaintiff is really relying on is the
25 statistical evidence, so to speak. How many people do you

1 have at your firm, how many lawsuits are commenced each year.
2 Well, it's physically impossible. And that's what Judge
3 Korman cited he wasn't going to do. Okay. Because I think it
4 would be speculative for any one of us to sit here and say,
5 you know what, that's physically impossible.

6 This case really boils down to three -- this case
7 has three components, the way I look at it, Judge. It has --
8 the first component is the letter.

9 THE COURT: Um-hum.

10 MR. BRUNO: Okay. And that -- I believe that might
11 be the first cause of action. Plaintiff says that the letter
12 is misleading and they've kind of clarified their position
13 more so in their reply paper than in their moving papers that
14 the reason it's misleading is because Mr. McCarthy appears on
15 the letter. They're not saying that the content of the letter
16 is, per se, misleading. They don't disagree with Greco on
17 that and Greco is directly on point. In fact, my clients
18 lifted the language from the Greco decision, that disclaimer
19 I'm talking about.

20 So they're basically saying because Mr. McCarthy
21 appears on that letter that that's misleading, but when you
22 really look at the letter, okay, first of all, Mr. McCarthy
23 isn't -- they're not saying that he's an attorney. There's a
24 block signature on the letter and Fulton, Friedman & Gullace
25 is in that block signature. Not Mr. McCarthy. Mr. McCarthy

1 is listed at the top only for the recipient to direct any
2 inquiries.

3 THE COURT: Yeah, but I get that and it's not Thomas
4 McCarthy, Esquire, Thomas McCarthy, Attorney at Law, Attorney
5 Thomas McCarthy, but it's a letter from a law firm signed by
6 the law firm and the only individual that's referenced in the
7 letter is Thomas -- Tom McCarthy.

8 MR. BRUNO: Right.

9 THE COURT: To the least sophisticated consumer
10 couldn't they reasonably infer that Tom McCarthy is a lawyer?

11 MR. BRUNO: Well, obviously our position is that,
12 no, a least sophisticated consumer should understand --

13 THE COURT: If my grandmother got this letter --

14 MR. BRUNO: Yeah.

15 THE COURT: -- an educated woman, she could
16 reasonably -- I'm not saying she's not sophisticated because
17 she was a very smart lady, she could reasonably confer that --

18 MR. BRUNO: This is on the record.

19 THE COURT: -- Mr. McCarthy was an attorney. You
20 don't get letters from a law firm unless the person is an
21 attorney.

22 MR. BRUNO: Well, I don't know if that's necessarily
23 true. I mean, I've received letters from law firms that
24 weren't signed by an attorney.

25 THE COURT: But you're not the least sophisticated

1 person. You're an attorney.

2 MR. BRUNO: Well --

3 THE COURT: You know the difference. The average
4 consumer or the le -- it's not even the average consumer.
5 It's the person at the bottom of the consumer chain or
6 spectrum, if you will.

7 MR. BRUNO: But this case also -- this letter also
8 has that clear disclaimer. It says -- and you have to add
9 that together, okay.

10 THE COURT: Definitely.

11 MR. BRUNO: You have to add it together and the
12 disclaimer specifically says that no lawyer has reviewed the
13 particulars in your case.

14 THE COURT: Aren't you asking me to, in essence,
15 decide the summary judgment motion?

16 MR. BRUNO: No. We're asking you to deny the motion
17 because the claim is futile, which we have --

18 THE COURT: Which presupposes that the claim is
19 futile so I'm getting to the merits of the claim and deciding
20 that the least sophisticated consumer could not be
21 misconstrued in this letter. I -- as a magistrate judge I'm
22 in a practical difficulty here. There's cases that go both
23 ways that say a magistrate judge can deny a motion to amend.
24 Others say you can't because you're in essence disposing of a
25 claim. I don't even think I need to get there because I

1 don't -- I think a very good argument could be made and has
2 been made that this letter is confusing to the least
3 sophisticated consumer. I think that's for Judge -- is Judge
4 Irizarry on this case?

5 MR. ARLEO: No, Your Honor

6 THE COURT: It got transferred? Yes. Before Judge
7 Irizarry. That decision is for Judge Irizarry to make.
8 Any -- with respect to the first claim on the letter itself
9 any argument to be made that the amendment is futile because
10 the defendant sought to be added -- or not proper parties
11 under that for that claim -- I mean, you're talking about the
12 named partners of the law firm. They control policy, right?

13 MR. BRUNO: Well, yeah. That's one of the points
14 that I wanted to make, too, is what we saw here is the names
15 of several individuals personally liable. I can't think of
16 anything more prejudicial than being sued. I mean, they're
17 looking to recover personal assets from these people.

18 Now, there's only two. Although the law firm has
19 three names, the testimony is clear. It's undisputed that
20 there's only two partners at this firm. It's Dante Gullace
21 and Allen Friedman. Cynthia Fulton was a partner. She no
22 longer was a partner in I think 2008/2009. The letter --
23 caution letter didn't even go out until 2010. What Mr. Arleo
24 pointed out is that --

25 THE COURT: Why is she still in the firm's name,

1 then?

2 MR. BRUNO: That I don't know. It might be a matter
3 of not -- simply not wanting to change the name. You know,
4 maybe brand recognition. I'm not really sure but what Mr.
5 Arleo pointed out was control. He's saying all that all these
6 people control policies and procedures. That's simply not
7 true. On Page 26 in Mr. Friedman's deposition transcript he
8 was asked specifically who controls the policies and
9 procedures. He said, "Myself" -- meaning Mr. Friedman --
10 "Dante Gullace." He was asked, "Anyone else?" His response
11 was "Absolutely none." There's two people that control
12 policies and procedures yet all these other individuals are
13 being named personally.

14 And I want to go back to the letter is that even
15 though you might have some reservations as far as the letter
16 misleading or being confused to the least sophisticated
17 consumer we still have individuals in which the amendment
18 seeks to name for violations of the FDCPA based on that
19 letter. And, again, these are individuals that had no
20 involvement in even preparing the letter.

21 So I don't see where the -- I don't see the
22 personal -- I mean, you can't just look at the claims and say,
23 well, this claim is going to be in. You also have to see --
24 look at who is it he --

25 THE COURT: Sure. That's why I ask about this.

1 Now, it's -- hold on. Let me see if I could easily find a
2 copy of the proposed amended complaint.

3 MR. BRUNO: I have a copy here.

4 THE COURT: Could I see it, please?

5 MR. BRUNO: Sure.

6 THE COURT: Okay. Well, Mr. McCarthy is the one who
7 sent the letter. He's prob --

8 MR. BRUNO: Well, he actually is on the letter. He
9 didn't send it. I don't think there -- I don't think he sent
10 the letter. I could be mistaken about it.

11 THE COURT: He's allowing his name to be used in
12 that fashion.

13 MR. BRUNO: He's on the letter, right. I'm not sure
14 if he mailed the letter is what I'm saying.

15 THE COURT: Mr. Verhagen.

16 MR. ARLEO: Well, I'm going to wait to reply to the
17 entirety unless Your Honor would like --

18 THE COURT: I'd like to hear specifically -- I mean,
19 Mr. Bruno has said, "Look, at his deposition Mr. Friedman said
20 me and Mr. Gullace are the ones who set the policy; no one
21 else."

22 MR. ARLEO: Well, I can address that quite easily,
23 Your Honor. First of all, you don't have to be an owner of a
24 law firm to control policies and practices. Let's take Mr.
25 McCarthy. He's running that whole show in Maryland.

1 THE COURT: You got Mist -- you're going to -- if
2 the -- I'll allow the amendment to go forward because Mr.
3 McCarthy is on the letter, allowed his name to be used --

4 MR. ARLEO: Right.

5 THE COURT: You know, shame on him. You're going to
6 get him if you get the amendment. You're going to get Mr.
7 Friedman and Mr. Gullace because Mr. Friedman has said, "It's
8 us." Talk to me about Verhagen, Reed [Ph.], Blair, Ms.
9 Fulton, and Zwicker [Ph.] & Associates. Do you represent
10 Zwicker?

11 MR. BRUNO: I do not. I do not.

12 THE COURT: They're unrepresented in this action.

13 MR. ARLEO: I can show you, Your Honor. Mr.
14 Friedman -- and, again, anything in context of what Mr.
15 Friedman says should be viewed upon as an alleged owner of a
16 law firm that's really never been to his call center in
17 Maryland so his credibility based on his operation should be
18 questioned first and foremost. That said, he also testified
19 that Ms. Fulton is still actively involved in giving
20 compliance advice. So based upon that testimony we have
21 enough to show we don't know what kind of compliance advice
22 she gave. She could have given compliance advice on all the
23 post-judgment remedies and on the letter. So we've got enough
24 based upon that testimony to name her as a defendant and take
25 her deposition and find out the extent of what advice she's

1 been giving them.

2 And very importantly, I think Your Honor brought it
3 out, she's still a part of this firm. It takes one day to
4 take her name out of there and that's been a quagmire in this
5 case since the beginning. Okay. Her name is still up there
6 and they keep contending she has nothing to do with it. Well,
7 if I'm resigning my position as a partner from a law firm and
8 I'm not still actively involved in controlling those policies
9 and practices why is my name up there? Why would I subject
10 myself to claims of personal liability. So clearly those
11 factors in and of itself show that she's controlling policies
12 and practices.

13 Mister -- the other individual who are named are
14 part of those people who are listed on the summons and
15 complaint. I mean, Judge, they're attorneys.

16 THE COURT: Mr. Verhagen, Ms. Reed --

17 MR. ARLEO: Right.

18 THE COURT: -- Ms. Blair.

19 MR. ARLEO: Right. Right. Well, Ms. Blair -- also
20 Mr. McCarthy testified that Ms. Blair participated in the
21 setup of the Maryland office. She gives the listings of the
22 post-judgment remedies --

23 THE COURT: That's right, that she --

24 MR. ARLEO: -- for debt collectors to call on and
25 call off. Okay. So she's clearly involved here. It's a

1 small firm. The lawyers who are on the summons and complaint,
2 okay, those lawyers actively assent to the fact that, yeah,
3 I'm going to -- here's your policy. All right. My name is on
4 there as an attorney. I'll allow you to do that and I'm going
5 to present myself as being actively involved in this case to
6 the least sophisticated consumer.

7 Zwicker & Associates is the firm that referred this
8 law firm -- the lawsuits to Fulton Friedman and we had
9 testimony from Mr. McCarthy that they're actively involved,
10 that they run the process, that the records -- transcripts
11 indicate that Zwicker is advised at every turn of the debt
12 collection process, so they're clearly -- and when they make
13 the payments it's distributed to --

14 THE COURT: The Zwicker trust?

15 MR. ARLEO: Yeah. The Zwicker trust, so clearly
16 they're involved in this.

17 But a couple other pointers, Your Honor, and very
18 important, first of all, they're claiming that Mr. Gallante
19 [Ph.] controls it. We went through the account records line
20 by line. At the deposition Mr. Friedman page by page, what
21 does this symbol mean, who is this person, who's that person.
22 I painstakingly did that. You know something --

23 THE COURT: He knows.

24 MR. ARLEO: -- there's not one reference to Mr.
25 Gallante.

1 THE COURT: Gullace.

2 MR. BRUNO: Who's Gullante?

3 MR. ARLEO: Gallante.

4 MR. BRUNO: Gullace.

5 THE COURT: Gullace.

6 MR. ARLEO: I'm sorry. Dante Gullace. You know,
7 there's not one reference to him in reviewing anything in this
8 file yet he signed a summons and complaint so that in and of
9 itself clearly shows that we have a viable claim here where
10 it's very important --

11 MR. BRUNO: May I finish my argument?

12 THE COURT: Yeah, yeah, yeah. You --

13 MR. BRUNO: We're talking about control. We're
14 talking about why these individuals are named in this
15 complaint and you're looking at three components here. You're
16 talking about the letter. Then you're talking about
17 supposedly telephonic communication. Then you're talking
18 about the summons and complaint. That's how they brought it
19 up. All right. That's not how I broke it up. That's how
20 it's argued.

21 And when you say "control," he used the word
22 control -- controls, policies and practices. Okay. Mr.
23 Friedman's testimony is very clear that only he and Mr.
24 Gullace do it. They can't dispute that. Okay. So what
25 they're arguing is while all these other people were involved

1 in training and things like that -- I'm a partner in my law
2 firm. We have a management committee. I give sexual
3 harassment training to the staff. That doesn't mean I control
4 the policies and procedures of the firm. I can't unilaterally
5 give a presentation and also change their complaint procedure.
6 Okay. The partners that control that is the management
7 committee. And here Mr. Friedman was very clear on who
8 maintains control and without that control why are these
9 defendants named in that letter.

10 THE COURT: Well, they're --

11 MR. BRUNO: There -- we're talking about attorneys
12 that had no involvement in that letter.

13 THE COURT: But for the letter -- for the letter the
14 amended complaint seeks to hold --

15 MR. BRUNO: All of them.

16 THE COURT: Hold on. No, I don't think so. I just
17 took a look at this. The firm, Fulton Friedman, the first
18 cause of action is delay, correct?

19 MR. BRUNO: Correct.

20 THE COURT: Fulton, Friedman, Ms. Blair, who set up
21 the Maryland office according to Mr. Arleo where the letter
22 was generated, Mr. Gullace, Ms. Fulton, Ms. Friedman, and
23 Zwicker & Associates on whose behalf the letter was sent.
24 Right. They're the client, right?

25 MR. ARLEO: The letter was sent on behalf of FIA.

1 THE COURT: What is --

2 MR. BRUNO: Zwicker & Associates I -- my
3 understanding, Judge, and this is just from reading the
4 transcript, Zwicker & Associates is a collection of law firms
5 in Massachusetts that referred the account for collections to
6 my client, but that doesn't mean that FIA who has the -- who
7 purportedly has the -- you know, the credit card agreement
8 with Mr. Sebro that's -- they're the client. They're my
9 client's client. I mean, they were named in the caption in on
10 a claim. That doesn't create an attorney/client relationship
11 between Zwicker & Associates and my client.

12 THE COURT: But on the first cause of action for the
13 letter Miz -- for the letter Mr. Verhagen and Ms. Reed are not
14 named.

15 MR. BRUNO: Okay. But Ms. Blair is and because she
16 set up the office that's not necessarily involvement in the
17 letter. And I think the testimony already came out on who
18 drafted the form of the letter.

19 MR. ARLEO: Can I be heard, Your Honor?

20 THE COURT: Yeah.

21 MR. ARLEO: Well, the issue -- Ms. Blair is a --

22 MR. BRUNO: An associate.

23 MR. ARLEO: -- plus down anyway. She's personally
24 controlling from the testimony regardless. She's personally
25 controlling. Whether or not she drafted that letter is a

1 presumption that she knows what's going on.

2 THE COURT: Does she run the call center?

3 MR. ARLEO: She's the one who set it up and she's
4 the contact person for Mr. McCarthy. Okay. She's been there.
5 They've all been there very infrequently but she's the one --
6 he testified that he calls her once a week so she's actively
7 involved in setting up the call center and the operation of
8 the call center.

9 But, again, Judge, this is a motion to amend the
10 complaint. We've got enough evidence to show here that
11 there's personal involvement of a small bunch of lawyers in
12 this entire debt collection practice that's going on. Each
13 and every phase of this is improper. So to the extent as an
14 attorney you're implicitly controlling it by allowing your
15 name to put -- to be put on a summons and complaint with
16 knowledge that you're going to imply at least a sophisticated
17 consumer that could imply that you've been actively involved
18 in that and you allow that to happen. You control that by
19 allowing it to happen.

20 MR. BRUNO: Judge, may I finish my argument? Okay.
21 So we're talking about the letter and you've identified who is
22 being sued personally in the first cause of action. Then you
23 get to the alleged telephonic calls and there's no evidence
24 that any of the individuals that have been sued ever spoke to
25 Mr. Sebrow. So, again, the question is why are these people

1 being named personally.

2 THE COURT: But that argument only gets you so far
3 because -- because by that reasoning a corporation that
4 employs someone to try to collect a debt cannot be held
5 responsible for what that person says on the phone because
6 they didn't make the call.

7 MR. BRUNO: No, I'm not saying -- I'm not -- that's
8 not what I'm saying, though. But if you're going to name
9 somebody personally for making misleading statements that are
10 in violation at the FDCPA, right, were other misleading
11 statements, who made them, the complaint doesn't say. The
12 complaint I think once again says that it's misleading for
13 when people call into this call center they think they're
14 talking to lawyers. Okay.

15 THE COURT: Your client didn't make -- didn't talk
16 to anybody.

17 MR. ARLEO: Well, we believe he did. I believe so,
18 Your Honor. I believe they called him. He definitely spoke
19 to them later on, I believe.

20 THE COURT: Did he?

21 MR. BRUNO: He spoke to my client twice. None of
22 the individuals that are named in the complaint -- amended
23 complaint.

24 MR. ARLEO: Well, Your Honor, it's not the issue of
25 whether or not they actively did.

1 MR. BRUNO: Well, it is if you're going to sue them
2 personally.

3 MR. ARLEO: No. It's whether or not they created
4 the processes to allow that act to occur. They didn't have to
5 be on that phone.

6 MR. BRUNO: They didn't --

7 THE COURT: Do you know who he spoke to?

8 MR. BRUNO: I do. I might not have brought that
9 with me, Judge. It wasn't -- I checked on that yesterday and
10 it was not any of the people that were listed in the
11 complaint. Oh, hang on. Forrest Willem [Ph.].

12 THE COURT: All right.

13 MR. BRUNO: He's an employee of -- employee,
14 presumably a debt collector.

15 THE COURT: Of Fulton, Friedman & Gullace.

16 MR. BRUNO: Yeah. Because he's not -- because he's
17 not an attorney.

18 THE COURT: All right.

19 MR. BRUNO: But we go back to the issue --

20 THE COURT: Who supervises the callers, Mr.
21 McCarthy?

22 MR. BRUNO: Mr. McCarthy does.

23 THE COURT: All right.

24 MR. BRUNO: Okay.

25 THE COURT: And Ms. Blair provides or has provided

1 this sheet for them to use as far as the --

2 MR. BRUNO: The script.

3 THE COURT: -- post-judgment? The script.

4 MR. BRUNO: Right.

5 THE COURT: Ms. Blair did the script. All right.

6 So if -- you know, if that is, in fact -- if those are the
7 facts, why can't Mr. McCarthy who supervises this person,
8 presumably has trained him, Ms. Blair prepares the script,
9 that's part of the policy and practice, the firm then employs
10 him, and the two partners of the firm who say that "We set
11 policy for this business," and Ms. Fulton who allows her name
12 to be placed on the firm's letterhead, why can't they all be
13 defendants? I mean, they set up -- someone who set -- people
14 who set up and control an entity that then -- and employees
15 that then violate the law and I know you're saying it's not a
16 violation of the law but that's for a jury to decide are not
17 personally responsible?

18 MR. BRUNO: Oh, but that's -- I'm not saying that at
19 all, Judge. I'm saying that to the person to actually do the
20 control is Gullace and Friedman and Fulton is a little bit
21 grey because you -- like you -- Your Honor said, she's on the
22 letterhead. My position is that she's not controlling. She's
23 on soc -- she's not controlling and I use that analogy on
24 control. I can't -- as a partner in my law firm I can't
25 change the policies and procedures and that's the distinction

1 I'm trying to make, Judge. Regardless of what Blair did,
2 right, that has to be approved. She's an associate of the
3 firm. That has to be approved by two people, Friedman and
4 Gullace. That's control. Otherwise if she was allowed to set
5 her own policy then, yeah, I would agree with my adversary
6 that, okay, now she's in some sort of control but she can't do
7 that. The only two individuals at the firm that control the
8 practices and procedures are Friedman and Gullace.

9 THE COURT: Blair is an associate.

10 MR. BRUNO: Blair is an associate. They only had
11 two partners at the law firm, Judge. I -- you know, I want to
12 talk a little bit about, you know, the relation-back theory
13 that you brought up. To a certain degree it is a surprise. I
14 mean, I don't think people -- I don't think just because the
15 law firm was sued that all these individual attorneys would
16 think that they would be sued as well even if they didn't have
17 any involvement in particular aspects of the underlying
18 collection letter or action.

19 I mean, we'll use Blair for an example. I mean, I
20 think Blair is being brought into this just because she either
21 wrote the script or she -- I think that's it. I mean, I'm not
22 quite sure why she would ever expect that she would be subject
23 to this lawsuit so there is -- you know, there is --

24 THE COURT: Mr. Gullace, Mr. Friedman, Ms. Fulton,
25 there's no surprise there.

1 MR. BRUNO: Well --

2 THE COURT: They knew -- they had to know from day
3 one.

4 MR. BRUNO: You're right, Judge, and I'm not arguing
5 that. But I'm going to use my analogy again. Say I -- you
6 know, say I give harassment training at my firm, I filed the
7 policies and procedures. One employee sexually harasses the
8 other, sues the firm. I don't think that I'm going to be
9 sued. I don't have any expectation that now I'm going to be
10 personally liable in a lawsuit because I gave training --
11 excuse me -- training at the direction of the two -- at the
12 management meeting, no.

13 So I don't think there was a reasonable expectation
14 for certain individuals that are named to be brought into
15 this. And I don't think the amendment should be allowed.
16 And, again, prejudicial. I wasn't involved early on. We did
17 argue that it took several months and I don't dispute Mr.
18 Arleo's accounts of what happened before I got involved, but
19 there is a degree of prejudice here and that is being named
20 individually in a lawsuit where plaintiff is seeking millions
21 of dollars presumably --

22 THE COURT: In my mind --

23 MR. BRUNO: -- and seeking personal assets.

24 THE COURT: -- that's not prejudice. The prejudice
25 that the federal rules talk about is inability to defend

1 because of passage of time. Things of that nature. It's
2 not -- every one -- every defendant in a lawsuit is prejudiced
3 if it's -- you know, I may have to pay a judgment so that
4 would just -- you know, that doesn't carry the debt.

5 I think -- look. You're making -- you're both
6 making very good points and it's, I think, a very difficult
7 decision and it can't be either grant or deny because there
8 are too many different claims that have different actors and
9 what I'm going to do is try to do the best that I can based on
10 the information that I have. I think overall there is not
11 undue delay. There is not prejudice. There is not bad faith.
12 And I don't think there's -- the amendment is futile for the
13 most part.

14 I will -- you know, unless you want to add more I --
15 this is where I'm going. On the first cause of action, the
16 letter, I think everyone sought to be named is fair game
17 except for Ms. Blair and Zwicker & Associates. I don't see
18 how they are involved in sending the letter out. If merely
19 setting up the Maryland office for Ms. Blair if that's, in
20 fact, what she did doesn't -- you know, she's an associate.
21 Doesn't mean that she controls the policies and practices of
22 the firm and that -- I mean, she's not a partner. Partner is
23 responsible for what they put in place.

24 MR. ARLEO: Your Honor, could I be heard on that
25 issue? The --

1 THE COURT: And let me finish. Let -- just let me
2 finish and then I'll hear you and we'll go claim by claim.
3 I'll give you each the opportunity to make your last minute
4 statements. Zwicker & Associates I don't know if they
5 referred the Sebrow account to Fulton, Friedman & Gullace. So
6 what? I don't know how that puts them on the hook for
7 anything and I'm hesitant to permit an amendment as to them
8 when they're not here to defend themselves against it. If I
9 let them in and then -- you know, I could very easily see them
10 coming and filing some motion after the fact whether it's a
11 motion to dismiss or motion for reconsideration. We had no
12 notice, so I'm not inclined to let them in as a defendant on
13 the first cause of action.

14 Mr. Arleo, go ahead.

15 MR. ARLEO: The issue that Jon is talking about is
16 that Mr. Gullace and Mr. Friedman are controlling everything.
17 It's impossible for them to control everything here. Clearly
18 they've delegated control to Ms. Blair and to other persons in
19 that firm. They can't do what's going on here. They can't
20 oversee everything. They can't control the aspect, the
21 ongoing everyday operation here. They've delegated it to
22 other lawyers in their firm doing it on their own and we think
23 especially with the call center, the letter issue that there's
24 enough here to show that they are personally liable for --

25 THE COURT: Where is Ms. Blair's office?

1 MR. ARLEO: She's in Rochester.

2 THE COURT: Okay. Mr. McCarthy -- she works out of
3 Rochester. Mr. McCarthy talks to her once a week and she
4 prepared the script and she set up the Maryland office. Who
5 said that? Gullace?

6 MR. ARLEO: No, Mr. McCarthy.

7 THE COURT: Mr. McCarthy. What does that mean she
8 "set it up"?

9 MR. ARLEO: They -- when -- I think it was set up
10 two years ago in January and he was called from another firm
11 and she was the contact person and physically went there and
12 explained to him what their goal was and what they wanted.
13 They wanted a call center of non-lawyers to work the cases
14 and, it's our position, to let people think that their lawyers
15 were working the case.

16 So to the extent that she participated in this whole
17 setup, Mr. Friedman didn't. We haven't even spoke to Mr.
18 Gullace, but just to say that they're partners and they
19 ultimately control everything that's not the standard under
20 the FDCPA, Your Honor. If anyone goes in there and creates
21 these -- I mean, Mr. McCarthy said he doesn't talk to Mr.
22 Friedman; he talks to Ms. Blair. Ms. Blair is his only
23 contact person, so the testimony there shows that she's giving
24 him direction and control over how that firm operates
25 including the sending of a letter.

1 THE COURT: Well, Mr. Bruno?

2 MR. BRUNO: Distinction I'm making, Judge, is that
3 the control element is who's setting up the policies and
4 procedures. That's what they're complaining about. They're
5 complaining that your policies and procedures violate the
6 FDCPA. What I'm saying is that that's not something Ms.
7 Blair -- she set it up. She physically set up the office, got
8 space, worked on the transition of accounts. I think some
9 accounts came in from another -- another company. You know,
10 that --

11 THE COURT: Who developed the letter?

12 MR. BRUNO: I believe that was either Mr. Friedman
13 or Mister -- excuse me, Mr. Friedman or Ms. Fulton. I think
14 Friedman said that he came up with a letter.

15 MR. ARLEO: No. And I think Ms. Blair participated
16 in the letter because the letter was sent from the Maryland
17 office. That letter was --

18 MR. BRUNO: Well, I think --

19 MR. ARLEO: -- never sent.

20 MR. BRUNO: -- "I think" is not enough.

21 MR. ARLEO: What --

22 THE COURT: I mean, if she -- if -- look. We're
23 talking about the letter. The first cause of action is the
24 letter.

25 MR. ARLEO: Right, right.

1 THE COURT: If she, Ms. Blair, created the letter --

2 MR. BRUNO: But, Judge, that still has to be
3 approved much the same way that -- again, I'm using a
4 traditional law firm. Much the same way an associate can
5 compare a letter, right, or a pleading or a motion that thing
6 still has to be approved by a partner at a law firm most of
7 the time. I'm using that as an analogy right now. So even if
8 Ms. Blair came up with a letter at it from scratch she
9 couldn't -- that cannot then be utilized to be part of the
10 policies and procedures at that firm until Mr. Gullace and Mr.
11 Friedman agreed to it.

12 THE COURT: I don't know. I mean, I don't know
13 that. Do we -- is there testimony to that effect?

14 MR. BRUNO: Well, Mr. Friedman was asked, "Who
15 controls?" He said, "Only those two control it."

16 THE COURT: Yeah, but that was a generic statement.

17 MR. BRUNO: And someone could say that and I'm
18 sure -- I'm sure in Fulton, Friedman & Gullace letters go out
19 by associates, by paralegals, by secretaries, by debt
20 collectors that are not each reviewed and approved by Mr.
21 Friedman or Mr. Gullace. It's got -- I mean, I can't believe
22 they look at every piece of paper and approved it.

23 MR. BRUNO: No, and I'm not suggesting that.

24 THE COURT: But what --

25 MR. BRUNO: So what I'm saying is that that letter

1 is based on -- I mean, it is a standard form letter, right.
2 It's no surprise. They're putting in the information. That
3 format was created and approved or at least approved by the
4 two partners of the law firm.

5 THE COURT: Where is it in the testimony that
6 that --

7 MR. BRUNO: I'll have to -- I'm going to have to
8 find -- I mean, I cited on page 26 of Mr. Friedman's, that's
9 the best I have for now where he was asked specific by Mr.
10 Arleo who controls policies and procedures and he answered,
11 "Myself and Mr. Gullace." Mr. Arleo's next question, "Anyone
12 else?" "Absolutely not."

13 MR. ARLEO: What do you think he's going to say,
14 Judge?

15 MR. BRUNO: Well, I mean, that's the evidence,
16 though, Judge. Unless the plaintiff can come forward with
17 something different then that portion of the claim is futile
18 because how are they going to dispute that down the road?

19 MR. ARLEO: It's very simple, Your Honor. Watch
20 this. It's not just setting the policy and practice. It's
21 set at some point but it's the inclination. Daily everyday
22 operation. I guarantee you Mr. McCarthy calls her. She
23 dictates what's going to go on in that Maryland office.
24 Mr. Friedman has no interest in that. Mr. Friedman has an
25 interest in gaining his default judgments.

1 THE COURT: Okay. Look, I think it's a very close
2 call with respect to Ms. Blair and we could do it one of two
3 ways. Zwicker & Associates is out. I just don't see --

4 MR. ARLEO: On the letter.

5 THE COURT: On the letter. I just don't see the
6 basis. We can either say the motion is denied as to Zwicker &
7 Associates and Ms. Blair with leave to -- without prejudice
8 and leave to renew a later date with more proof that Ms. Blair
9 actually had some involvement more than, you know -- more than
10 a little bit of involvement in that letter. Let's say Ms.
11 Blair was the one who created the letter, gave it to Mr.
12 McCarthy for use in the call center, and Mr. Gullace and Mr.
13 Friedman didn't approve it even though they have control of
14 policies and practices and procedures. If she was the one --
15 if this was her idea she set in place, I think she's -- could
16 be responsible.

17 So she's on notice that, you know, this -- there --
18 it may -- the day may come when they present evidence to me
19 that, you know, she was more involved than Mr. Bruno believes
20 her to be involved right now and then we'll relate it back.

21 MR. ARLEO: I believe, Your Honor, at a minimum
22 she's a nonparty witness.

23 THE COURT: Well, you could -- I mean, that's -- you
24 can get --

25 MR. ARLEO: Yeah.

1 THE COURT: -- you can take her deposition.

2 MR. ARLEO: I'm not disputing that.

3 THE COURT: Yeah, yeah. No, but the question is
4 whether she should be a defendant now and I'm saying not yet.
5 You have the opportunity to come back at a later date and
6 we're going to set a schedule in a little while for that but
7 Zwicker & Associates is out.

8 The second cause of action, the telephone calls.
9 Fulton, Friedman is in. Mr. Gullace, Mr. Friedman, and Ms.
10 Fulton are in. Mr. McCarthy, put him to the side for a
11 minute. Zwicker & Associates is out and Ms. Blair is out, the
12 same ruling. If you can show that Ms. Blair has more control
13 than we've talked about today you can seek to get her back in
14 on this claim -- this cause of action.

15 MR. ARLEO: We got her in, Your Honor, on the fact
16 that she creates the scripts for referencing to the post-
17 judgment underneath. If that's not controlling I don't know
18 what it is. Again, there's no control from Mr. Friedman or
19 Mr. Gullace. These lawyers are doing this on their own while
20 these other lawyers are doing real estate law.

21 MR. BRUNO: That's not true.

22 THE COURT: Do we know what was discussed with Mr.
23 Sebrow during his phone call? Do we have a tape of it?

24 MR. BRUNO: I -- that I don't know. I don't have a
25 tape and I think you've asked that part and he never got a

1 clear answer. I'll try to get a clear answer. I have kind of
2 a -- this is not official, Judge, or maybe. Associates --
3 there were two phone calls -- conversations. The first was on
4 June 21, 2010, although the notes had a typo. It said June
5 12th, which his impossible because the letter wasn't until
6 June 14th.

7 THE COURT: Because he didn't get the letter.

8 MR. BRUNO: The debtor says -- looking at filing
9 bankruptcy, says "Won't give it (probably the bankruptcy
10 docket number or his bankruptcy attorney's name and phone
11 number). Will keep me posted." That was June 21, 2010.

12 MR. ARLEO: That's what he said to the collector.

13 MR. BRUNO: This is actually me reading an email.
14 My associate typed me what the note --

15 MR. ARLEO: What was said on the note.

16 MR. BRUNO: -- said. I can't verify if this is -- I
17 didn't bring the notes.

18 MR. ARLEO: What was said by the plaintiff. It
19 doesn't say what was said by the plaintiff.

20 MR. BRUNO: December 3, 2010, debtor says, "Filed a
21 motion on account. I advised to check with court (maybe
22 debtor advised me to check with court)." That's all I have.
23 And, again, these were conversations with an individual that's
24 not a part of this lawsuit or in the amended complaint.

25 THE COURT: What did Mr. McCarthy say about this

1 script?

2 MR. ARLEO: That she created the script from each
3 different states, differences in post-judgment remedies and no
4 scripts had I believe -- again, Your Honor, I don't have that
5 transcript in front of me. When I said 7500 I was reading
6 that from the amended complaint. I just want to clear that
7 up.

8 THE COURT: Let's say -- let's say Mr. Gullace or
9 Mr. Friedman said, "Ms. Blair, I want you to prepare a script
10 or a chart showing each state's post-judgment remedy
11 procedures" and she does. I mean, she's an associate. She's
12 tasked with something. She does it. That then goes to the
13 call center. Someone sends it and says, "Your caller should
14 look at this when they're talking with the people, the debtors
15 and, you know, you intimidate them with that." Whatever
16 they're going to do, you know. How is she responsible? She
17 was told, "Prepare this script" and she did it.

18 MR. ARLEO: Well, I think, Your Honor --

19 THE COURT: It -- there's no allegation that the
20 script is incorrect, right? It could be right as rain,
21 perfect. The violation is that it's being used to intimidate
22 and if she didn't play a part in that how is she responsible?

23 MR. ARLEO: I would say this, Your Honor. First of
24 all, it is presumed that that conversation went on in this
25 type of setup. It's contrary to our theory. Our theory is

1 hire Mr. McCarthy, send Ms. Blair up, and set that office up.
2 Our theory is do what you have to do to put this thing into
3 effect. So to presume that Mr. Friedman or Mr. Gullace had
4 that type of instruction with Ms. Blair we think the evidence
5 shows otherwise. She created these top-off forms, okay, and
6 at this point we've got enough to show we don't have any
7 testimony from Mr. Friedman. We said, that -- wouldn't you
8 think he would have said that during his deposition when he's
9 saying that he controls the policies and practice. For
10 example, you're telling us that we are talking about post-
11 judgment remedies. I did that. He didn't say that. So we've
12 got --

13 THE COURT: Well, he answers questions at a
14 deposition. Unless the question is specifically asked, I
15 mean, I'm sure Mister -- did you prepare him for the
16 deposition?

17 MR. BRUNO: I wasn't involved in the case yet.

18 THE COURT: It was -- that's right. It was -- he's
19 going to ask the specific question. If it's --

20 MR. ARLEO: But again, Judge, this is an assumption.
21 And I think I'd be willing to go where Your Honor is trying to
22 go here. We don't want to harass anybody. We think she's
23 personally controlling policies and practices. We think she's
24 liable, but we haven't spoken to her yet and you've got enough
25 evidence to prove that she was. We hope that Your Honor would

1 let her in but from what I'm hearing, you know, I'm confident
2 in getting her deposition as a nonparty confirming what we
3 believe.

4 MR. BRUNO: Judge, I want to point out because you
5 raised it is that I don't believe -- and Mr. Arleo will
6 correct me if I'm wrong, I'm sure -- I don't believe the
7 allegation is that the script is wrong. I'm reading from Mr.
8 Arleo's reply. It says, "The second cause of action is based
9 only upon the pleaded factual allegations establishing that
10 defendant's non-attorney debt collectors referenced the
11 possibility of legal action and post-judgment remedies could
12 lead to least sophisticated consumer into believing that the
13 debt collectors are attorneys licensed to practice law."

14 So, again, the allegation violation is that the
15 script somehow leads these consumers to believe that who
16 they're speaking to is a lawyer. That's what they're alleging
17 is the violation. They're not alleging --

18 THE COURT: The script is wrong.

19 MR. BRUNO: The script is wrong. So, again, you
20 know, we're back to the same thing with the letter but just
21 kind of the verbal communication is -- and in this case Mr.
22 McCarthy didn't make any calls. I mean, so how would these
23 individuals -- you know, I'm talking about those that aren't
24 in control of that script, however they like --

25 THE COURT: Is Mr. McCarthy in control of the call

1 center? He's the head guy?

2 MR. BRUNO: He manages it.

3 MR. ARLEO: Totally and the other --

4 THE COURT: He's in on this claim. Ms. Blair is
5 out. Zwicker & Associates is out. Everybody else is in.
6 Fulton, Friedman certainly as a firm, Gullace as an
7 individual, Mr. Friedman as an individual, and Ms. Fulton for
8 allowing herself to be held out as a member of the firm and
9 presumably her, you know, advice to the firm, her compliance
10 advice.

11 MR. ARLEO: Just one clarification, Your Honor.

12 THE COURT: Um-hum.

13 MR. ARLEO: The complaint is not limited to them
14 thinking that their lawyers by referencing to post-judgment
15 remedies, that's true, but it also expressly pleased that
16 referencing to post-judgment remedies --

17 THE COURT: Is inviolative in and of itself. All
18 right. Now, the third cause of action is the filing of these
19 lawsuits. Fulton, Friedman, certainly that's the firm.
20 Gullace, Friedman and Fulton individually, and I'm inclined to
21 let in Mr. Verhagen, Ms. Blair, and Ms. Reed if they're the
22 ones who were on the --

23 MR. ARLEO: The summons and complaint.

24 THE COURT: -- the summons and complaint and my
25 thinking is this. Notwithstanding Judge Korman's decision,

1 187-1/2 lawsuits a month, seven a day, is a lot for one
2 attorney to do especially because I think there's -- I read
3 somewhere that this is not all that they do.

4 MR. ARLEO: Right. That's the point, Judge.

5 THE COURT: It -- I don't think I could do that.
6 I'm pretty efficient. Right, Vickie? And I understand these
7 are not, you know, 50-page complaints and, you know, they're
8 not big cases but it's still a little much, so it's not
9 futile. The -- you can make a case. You have enough to get
10 over that low threshold of amending, but I know you feel
11 strongly or your client feels strongly about this so your last
12 words, Mr. Bruno.

13 MR. BRUNO: Well, I'd be repeating myself, Judge.
14 Basically, I mean, the plaintiff's argument on that third
15 cause of action is simply statistics and I understand we're
16 somewhat in the pleading stage again based on the proposed
17 amended complaint, but it really is just based on the numbers.
18 And, you know, I disagree they're able to do it. They have
19 been and when they're not able to do it what do they do? They
20 hire more lawyers. It's as simple as that. And the firm has
21 grown I think since 2010 because of the need for new lawyers.

22 So, you know, right now we're at this pleading stage
23 and I understand that, you know, where you're leaning towards
24 ruling, but I don't view the numbers too differently than the
25 case with Judge Korman. I understand those were their letter

1 cases but as you point out these aren't, you know, complicated
2 theories that are being set forth and oftentimes these
3 collection cases don't get litigated to the nines. You know,
4 they get resolved. I think we've all seen it. We've all been
5 in court and see collection attorneys go in there with a stack
6 of files and, you know, they try to resolve the cases quick.
7 Just because they file a case on Monday doesn't mean it's not
8 going to get resolved on Tuesday, you know. So I think the
9 numbers are skewed. And you can't look at it strictly on
10 statistical evidence. And Mr. Friedman testified as to what
11 the lawyers in New York do and there is meaningful review and
12 you can't base the decision strictly on the numbers.

13 THE COURT: All right. I've ruled. Motion granted
14 in part, denied in part. If there's any misunderstanding as
15 to what I said, get the transcript. That leaves -- and you're
16 going to file the amended complaint. You're going to serve it
17 by the end of next week and then we need to think about where
18 we go from there.

19 MR. BRUNO: Judge, I think we're going to need more
20 time for discovery. Obviously we have a discovery deadline
21 that's either close -- coming up or close to passing.

22 MR. ARLEO: I would suggest now that Jon has come in
23 on the case and his professionalism has brought this to the
24 level of lawsuit --

25 MR. BRUNO: And settlement.

1 MR. ARLEO: -- I think you should really talk to
2 your client --

3 THE COURT: Well, you -- I mean, you're --
4 settlement is a big issue here because it's pled as a punitive
5 class action so --

6 MR. BRUNO: Yeah.

7 MR. ARLEO: Well, we can settle it on a class basis.

8 THE COURT: I mean, that's -- but --

9 MR. BRUNO: We'll consider. I don't think it's
10 necessary to speak on the record on this.

11 THE COURT: Yeah. You -- what you need to do is
12 file a -- we said the end of next week you're going to serve
13 so by September the 9th it's going to be served. I would like
14 a proposed case management plan by September 16th. And soup
15 to nuts. And it's going to be -- you're going to need to file
16 a motion for class certification, right? You'll need to do
17 some more discovery. I really don't want you to redo the
18 depositions of whoever has already been deposed unless there's
19 a huge need for it.

20 MR. BRUNO: Yeah. I would actually --

21 THE COURT: So --

22 MR. BRUNO: -- object to that now, Judge, because if
23 Mr. Arleo's position is correct that they --

24 THE COURT: Oh, is there --

25 MR. BRUNO: -- anticipated --

1 THE COURT: They have everything they need and --

2 MR. BRUNO: They should have it.

3 THE COURT: Right. Well, you -- talk about it, you
4 know. Figure out who else you need to depose and you want to
5 do Ms. Reed. Well, she's a party on the third claim so that
6 doesn't really matter but you're certainly going to want to do
7 her, Mr. Verhagen, Ms. Blair. I don't know who else there is.
8 Have you taken -- I mean, not you, but has the plaintiff been
9 deposed?

10 MR. BRUNO: Yes.

11 THE COURT: Okay.

12 MR. ARLEO: Yes, Your Honor.

13 THE COURT: You've got to figure out your schedule
14 and you'll get it to me on the 23rd.

15 MR. ARLEO: Your Honor --

16 MR. BRUNO: 23rd?

17 MR. ARLEO: -- can I back up for one second?

18 THE COURT: Of September. Did I say -- no, no.

19 MR. BRUNO: Said 9/16.

20 THE COURT: 16. I'm sorry. 16.

21 MR. ARLEO: Can I back up for one second? Service
22 in eight days of everyone? I don't know if we're going to be
23 able to --

24 THE COURT: How hard is that?

25 MR. BRUNO: I think I would --

1 MR. ARLEO: It's very easy to make serve --

2 MR. BRUNO: -- accept service on my clients. I
3 don't know. And I don't know how technical you are, Judge. I
4 mean, we still have Zwicker & Associates named in a proposed
5 caption. There's allegations against them. Obviously, I'm
6 not going to respond to those. I don't know --

7 THE COURT: You're going to -- I mean, they're
8 not -- there's -- they're not in.

9 MR. ARLEO: We'll modify the amended complaint.

10 THE COURT: Yeah. Modify the amended complaint --

11 MR. ARLEO: Pursuant to the order.

12 THE COURT: -- pursuant to the order. If Mr. Bruno
13 is willing to accept service on behalf of the defendants, so
14 be it. That would make it easy. If not then, you know,
15 you'll let him know and you'll have to serve them -- I mean,
16 it shouldn't be that hard. They're --

17 MR. BRUNO: I'm pretty sure I'll --

18 THE COURT: Yeah, yeah.

19 MR. BRUNO: -- be able to accept service, Judge.

20 MR. ARLEO: Have them removed because they know that
21 they have -- that we have eight days to serve and all of a
22 sudden someone gets --

23 THE COURT: They're in Bermuda.

24 MR. ARLEO: -- vicious pneumonia, cross-country
25 travel plans or, you know, spring skiing early. I'm just

1 concerned with that.

2 MR. BRUNO: I will get back to Mr. Arleo within 24
3 hours if I'm authorized to accept service.

4 MR. ARLEO: And if he's not, Your Honor, may I have
5 a longer period to serve? We'll get on it right away.

6 THE COURT: You'll write me a letter if he said, you
7 know --

8 MR. ARLEO: If I [inaudible]?

9 THE COURT: And you'll ask for whatever period of
10 time you want.

11 MR. ARLEO: Okay. Thanks.

12 THE COURT: When you're figuring out your proposed
13 schedule keep it as short as you can. We -- especially -- I'm
14 sure the defendants they want this to be done with and you may
15 build in a period for summary judgment motions, so soup to
16 nuts. Don't -- you know, this is not going to take a year.

17 MR. ARLEO: And that's by the 16th.

18 THE COURT: That's by the 16th.

19 MR. BRUNO: We'll have to confirm before that. I'm
20 going to be out of town.

21 THE COURT: Is the 23rd better? Why don't we make
22 it the 23rd. Yeah, the 23rd.

23 MR. BRUNO: Okay.

24 THE COURT: All right. So service filed by the 9th,
25 scheduled by the 23rd. If you can't work out the service

1 issue write me and ask for whatever time you need, all right?

2 MR. BRUNO: All right. Thank you, Judge.

3 THE COURT: Thank you very much.

4 (Proceedings concluded at 12:56 p.m.)

5 * * * * *

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

4 
5

6
7 Ruth Ann Hager

8 Dated: September 29, 2010
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25